

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

AUXIER FINANCIAL GROUP LLC,

Plaintiff,

vs.

QUALITY LOAN SERVICE CORP. of
WASHINGTON; JP MORGAN CHASE
BANK, N.A.; BANK OF AMERICA N.A.
as Successor by Merger to LaSalle Bank
NA as TRUSTEE for Washington Mutual
Mortgage Pass-through Certificates WaMu
Series 2007- OA4 Trust, and as TRUSTEE
for Washington Mutual Mortgage Pass-
Through Certificates MWALT Series 2007
OC1 Trust.

Defendants.

No. 2:10-cv-02070 MJP.

Plaintiff's Response to Defendants' Motion
for Summary Judgment

Originally
Noted for December 30, 2011

Filed as a Document Subject to
Plaintiff's Motion to Accept Late Filing
Noted for Friday, February 3, 2012

Plaintiff Auxier Financial Group, LLC, by and through Edward L. Mueller, its legal
counsel of record, responds to and opposes Defendants' Motion for Summary Judgment by JP
Morgan Chase Bank, N.A. & Bank of America N.A. as Successor by Merger to LaSalle Bank
NA as Trustee for Washington Mutual Mortgage Pass-through Certificates WaMu Series

Plaintiff's Response to Defendants'
Motion for Summary Judgment

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2007- OA4 Trust, and as Trustee for Washington Mutual Mortgage Pass-Through Certificates
MWALT Series 2007 OC1 Trust.

I. INTRODUCTION

1.1 Procedural Posture and Pleadings Prior to Defendants' Motion To Dismiss.

The pleadings and posture of the parties in this case are unusual. Plaintiff filed its Complaint on December 24, 2010, claiming (1) Violation of the Washington Deed of Trust Act RCW 61.24 *et seq.*, (2) Slander of Title, (3) Wrongful and Unlawful Foreclosure as an Unfair Business Practice. In violation of RCW 19.86., (4) Declaratory Judgment re: Lack of Standing to Foreclose, and (5). Temporary Restraining Order, Preliminary and Permanent Injunction. Plaintiff served its summons and complaint on Defendant Quality Loan Service Corp. of Washington.(hereinafter QLS) in early January 2011. The purpose for serving process initially on QSL was to stop the pending non-judicial foreclosure, that had triggered the need for the lawsuit. Without that pending foreclosure Plaintiff would not have started this lawsuit. After QSL was served process it continued the sale into March 2011. Thus, no application for TRO was necessary to delay the foreclosure sale.

Defendants JPMorgan Chase Bank, N.A. and Bank of America N.A. as Successor by Merger to LaSalle Bank NA as Trustee for . . . OA4 Trust, and as Trustee for . . . OC1 Trust, appeared through current legal counsel on January 4, 2011, even though those defendants had not yet been served with process. Those Defendants were subsequently served with process in February, 2011.

Defendant Quality Loan Service Corp. of Washington appeared through other separate legal counsel on January 7, 2011. At that time QLS had recorded a Notice of Trustee's Sale

1 with respect to the property at 2525 Center Rd , Everett WA 98204, which is one of the
 2 subjects of this lawsuit., See Decl. of Edward L. Mueller, etc. pp.6 & 7, ¶¶ 8 & 9, and Ex.
 3 EM-5. The problems with that foreclosure from Plaintiff's perspective were stated in
 4 Plaintiff's Complaint, p. 3, lines 17-21 & pp. 9 & 10, ¶ 2.8, as explained below.

5 After the lawsuit was commenced, Quality Loan Service's legal counsel contacted
 6 Plaintiff's counsel by e-mail on February 3, 2011 challenging the allegations in the complaint
 7 that the non-judicial foreclosure was commenced in violation of the specific requirement of
 8 RCW 61.24.010(2) that an appointment of successor trustee must be recorded in the county
 9 where the property to be foreclosed upon is located before a successor trustee may commence
 10 a non-judicial foreclosure proceeding, as pleaded in the Complaint (Dkt # 1) at p. 10, lines 2-
 11 12 inclusive. See Declaration of Edward L. Mueller, etc. (Dkt # 33) p. 8, line 19 through p. 9
 12 line 7, and Exhibit EM-6 for the facts that support that allegation. **Ex. Em-6** is an
 13 Appointment of Successor Trustee recorded in Pierce County under Pierce County Recording
 14 No. 201008020398, appointing Quality Loan Service as successor trustee with respect to the
 15 Deed of Trust that encumbers 2525 Center Rd, in Everett WA 98204 in Snohomish County on
 16 which Quality Loan Service had recorded The Notice of Trustee's Sale it recorded under
 17 Snohomish County Recording No. 201008130651.

18 The same or a similar Appointment of Successor Trustee document had not then and
 19 still has not been recorded in Snohomish County insofar as Plaintiff or its legal counsel knows.
 20 See Declaration of Edward L. Mueller, etc. (Dkt # 33) p.7, lines 4 -18 incl.

21 Nevertheless, Quality Loan Service did not terminate its Notice of Trustee's Sale
 22 recorded under Snohomish County Auditor's Recording No. 201008130651 referred to in the
 Complaint, p. 3, lines 17-21 & pp. 9 & 10, ¶ 2.8, even though QLS and its legal counsel knew

by February 7, 2011, that no document had been recorded in Snohomish County that appointed Quality Loan Service as successor trustee of the Deed of Trust recorded under Snohomish County Auditor's No. 200702270788, which deed of trust Quality Loan Servicing claimed in its recorded Notice of Trustee's Sale gave it the power of sale. Thus QLS had no power of sale. See RCW 61.24.010(2).

In the Initial Joint Status Report (Dkt# 10) the position of Defendant Quality Loan Service was stated with its counsel's approval, as follows:

"C. Current Position of Defendant Quality Loan Service.

Defendant Quality Loan Service intends to defend against each of the claims of Plaintiff against this defendant, and agree that the case is not unusually complex."

Regardless of its official stated position, Quality Loan Service did not hold any non-judicial foreclosure of the Deed of Trust described in its Notice of Trustee's Sale, and the maximum time limit for continuing a non-judicial foreclosure under the Notice of Trustee's Sale recorded under Snohomish County Auditor's Recording No. 201008130651 with the time limit required by RCW 61.24.040(f)(6)¹ has expired,² although Plaintiff continues to be concerned about the possibility of a new non-judicial foreclosure in the name of the purported beneficiary Bank of America N.A. as Successor by Merger to LaSalle Bank NA as Trustee for

¹ That code subsection in relevant part reads:

(6) The trustee has no obligation to, but may, for any cause the trustee deems advantageous, continue the sale for a period or periods not exceeding a total of one hundred twenty days

² See *Albice v. Premier Mortgage Services of Washington, Inc., et al.* 157 Wash. App. 912, 239 P.3d 1148 (2010); review accepted 170 Wn.2d 1029 (2011). at 239 P.3d 1155, 1156, where the Court of Appeals, Div. 2, held the non-judicial foreclosure sale void for violation of the code subsection quoted in f.n.1 above. That opinion relied in part on *Bingham v. Lechner*, 111 Wash. App 118, 131, 45 P.3d 562 (2002). Id. 1156.

1 the . . . OA4 Trust. No other foreclosure by any defendant has been commenced during the
 2 pendency of this lawsuit. There is no foreclosure, non-judicial or judicial, now pending.

3 When it became obvious that the foreclosure sale had been dropped by QLS, and
 4 would not be restarted by QLS, that meant that Plaintiff probably had no claim for damages
 5 against Defendant QLS. Plaintiff voluntarily dismissed Defendant QLS, for that reason and
 6 for other reasons related to diversity jurisdiction. Furthermore the erroneous filing in Pierce
 7 County had been made by or on behalf of JP Morgan Chase Bank or Bank of America as
 8 Successor by merger to LaSalle Bank NA as Trustee for the . . . OA4 Trust. Thus the claim of
 9 violation of RCW 61.24.010(2) still appeared viable against the remaining defendants.

10 To be specific, prior to Defendants' Motion for Summary Judgment none of the
 11 remaining Defendants asserted any specific right to foreclose in any pleading or other notice;
 12 but Plaintiff was aware that Bank of America as Successor by merger to LaSalle Bank NA as
 13 (1) Trustee for the . . . OA4 Trust or as (2) Trustee for the . . . OC1 Trust, could start a new
 14 non-judicial foreclosure based on the respective recorded assignments.

15 As of the date of filing of Defendants' Motion for Summary Judgment (Dkt # 22), no
 16 Defendant has answered the Complaint, nor filed any pleading documents in the Court file, nor
 17 requesting any affirmative claim of any kind against Plaintiff, such as a right to foreclose.
 18 Defendants' Motion For Summary Judgment (Dkt # 22) simply asks for dismissal of Plaintiff's
 19 claims based on:

20 (1) Lack of standing to assert a claim; and

21 (2) Lack of evidence to support the elements of Plaintiff's claims or the relief requested

22 Plaintiff will address those subjects in that order in the parts of Plaintiff's Response
 entitled III. – Plaintiff's Statement of Relevant Facts, and IV. - ARGUMENT.

II. PLAINTIFF'S STATEMENT OF THE RELEVANT FACTS.

The Plaintiff's statement of relevant facts are mostly contained in (1) the Declaration of Josh Auxier, etc., filed January 25, 2012 as an attachment to the Praecipe for Substitution of Document to Correct Errata (Second Errata Correction) (Dkt No. 37; 37-1; 37-2; and 37-3.) This replaces the earlier filing that became Dkt # 32 with attachments, which in turn replaced an earlier filing that became Dkt # 31. In summary, the Decl. of Josh Auxier states his personal knowledge of the history of the acquisition of the rights to ownership and possession of both interrelated parcels that are part of the subjects of this law suit. See Decl. of Josh Auxier," (Dkt # 37-1) p. 12, line 22 through p. 19, line 16, ¶ 2.1, and sub-¶¶ 2.1.1, 2.1.2, & 2.1.3. He specifically states his personal knowledge of three different documents the sellers (Mr. Sellars and Mr. Greene) signed between March 21, 2009, and April 14, 2009 that shows the full name of the buyer in the two interrelated transactions – namely, Auxier Financial Group LLC dba International Business Brokers & Associates. Each of the documents was short (one to two pages) and easy to read.

Each of the three documents described above clearly and plainly stated that Mr. Sellars and Mr. Greene were selling both interrelated properties to Auxier Financial Group LLC dba International Business Brokers & Associates (IBB&A). Both sellers were knowledgeable real estate investors at the time the transactions closed on March 27, 2009 as provided in the respective purchase and sale agreements; and Mr. Greene was and is a real estate broker. In short, the Declarations of Mr. Sellars and Mr. Greene are inconsistent with the documents they signed, two of which were recorded, showing to whom they were selling and agreeing to sell the interrelated parcels of property. Those facts and documents alone create questions of fact

1 that cannot be resolved by a Motion For Summary Judgment.

2 Mr. Auxier's Declaration (Dkt # 37-1) beginning at p. 2, line 1 through p.12, line
3 line20, ¶¶ 1.1 through 1.20 incl., state his personal knowledge of the five different versions of
4 the note that he has seen, when he first saw each version, and the fact that he had asked for a
5 copy of the original note in 2009 from Washington Mutual Bank, and understood that the copy
6 of the note sent to him was a copy of the original note as it existed at that time. it was sent to
7 him. He relied on that version of the note to make the payments of \$14,850.84 to Washington
8 Mutual Bank and later to JPMorgan Chase Bank after it claimed to be successor to WaMu
9 bank. See Decl. of Josh Auxier, ¶¶ 2.3, 2.8, 2.9, & 3.0.

10 But the real problem, as the Decl. of Josh Auxier points out at page 2. Line 1, through
11 p. 12, line 20, is that the five multiple versions of the note that Defendant's have produced,
12 should be viewed as part of the fact pattern that JPMorgan Chase Bank authorized and made
13 two successive assignments for value received of "all beneficial interest" in the same note and
14 deed of trust to two different investment trusts more than a year apart, The first assignment
15 was signed on November 3, 2008 in Dakota County MN, and recorded on November 19, 2008
16 under Snohomish County Recording No, 200811190037, That Assignment was reputedly
17 made by JPMorgan Chase Bank of all of its beneficial Interest in both the note and the deed of
18 trust to LaSalle Bank NA, as Trustee for the . . . OC1 Trust. JPMorgan Chase Bank has
19 admitted that the person who signed that Assignment had authority to do so. (Whether that
20 admission was made to avoid discussion of identity of the signer and the legal impact of that
21 assignment, given the legal questions raised in the complaint and in the argument below is a
22 separate question.) That assignment was made before Bank of America had merged with

LaSalle Bank and claimed to be its successor. LaSalle Bank as Trustee for the . . . OC1 Trust, was the reputed beneficiary for which the foreclosure was in progress when Plaintiff paid \$17,020,71 to reinstate the Sellars loan so that Auxier Financial could make a binding agreement by which to acquire the property. That assignment to LaSalle Bank as Trustee for the . . . OC1 Trust of the Sellars Loan was the only assignment recorded at the time Auxier Financial made its payments and closed on the two interrelated transactions on March 27, 2009. Auxier Financial had a right to rely on the status of recorded documents at that time to show who the creditor was. Auxier Financial became a bona fide purchaser of the vendee's interest and rights to the two interrelated properties, subject to the terms of that recorded document. Even if Defendants have produced conflicting evidence, (and Plaintiff claims Defendants have not) such evidence creates disputed issues of fact.

When JPMorgan Chase Bank made the second assignment of the same note and deed of trust dated May 6, 2010, recorded on May 18, 2010, under Snohomish County Recording No. 201005180285, JPMorgan Chase owned and possessed no interest of record in the Sellars Loan according to the earlier assignment, because Chase had not received back from LaSalle Bank, NA, or any other representative of said Trustee for the . . . OC1 Trust the beneficial interest and note reported to have been transferred under the earlier Assignment recorded under Snohomish County recording No, 200811190037 by JPMorgan Chase Bank. Nevertheless, QLS proceeded to base its Notice of Trustee's Sale dated August 11, 2010, and recorded under Snohomish County Recording No. 201008130651 on that second assignment. See Ex. Em-5, attached to and incorporated into the Decl. of Edward L. Mueller at p. 6, ¶ 8.

1 That evidence creates issues of fact, as well as issues of law as to whether or not any of
 2 the Defendants have standing to foreclose on the deed of trust even if Defendant Chase bank
 3 "holds" the properly indorsed note, because plaintiff's evidence indicates that the deed of trust
 4 was transferred twice for value received while JPMorgan Chase intentionally, at the same time
 5 withheld delivery of the note to the reputed assignee beneficiaries with respect to each
 6 respective assignment. Therefore, based on those facts Plaintiff believes the Note is now
 7 unsecured because of the intentional acts of JPMorgan Chase Bank.

8 III. ARGUMENT.

9 3.1. Legal Standard & Authorities Re Summary Judgment.

10 In order to determine if Defendants Motion for Summary Judgment is appropriate the
 11 court must take into consideration several factors as defined by the US Supreme Court in
 12 *Anderson v. Liberty Lobby, Inc.*, 477 US 242 (1986). In *Anderson* the Supreme Court made
 13 several statements defining when summary judgment is appropriate. "*This court's function is*
 14 *not 'to weigh the evidence and determine the truth of the matter but to determine whether*
 15 *there is a genuine issue for trial.'*" The court went on to further define a "genuine issue" as
 16 "An issue of fact is genuine if the evidence is such that a reasonable jury could return a verdict
 17 for the nonmoving party." The Court also ruled "In considering a motion for **summary**
 18 **judgment**, the 'evidence of the non-movant is to be believed, and all justifiable inferences are
 19 to be drawn in his favor'."

20 A motion for summary judgment is only appropriate "... *when there is no genuine issue*
 21 *of material fact and the moving party is entitled to judgment as a matter of law.*"

22 Defendants' Motion For Summary Judgment is not appropriate in this case because

1 there are several genuine issues of material facts in dispute that are appropriate for trial, as
 2 shown in Part II. Plaintiff's Statement of the Relevant Facts, above. Defendants motion
 3 should be denied in the instant case because (1) there are genuine issues of material fact in
 4 dispute that are appropriate for trial and; (2) Defendants are not entitled to judgement as a
 5 matter of law given the disputed facts and possible inferences therefrom.

6 **3.2. Defendants' claim that Plaintiff does not own and has no interest in the**
 7 **Subject Property and therefore has no standing to bring the claims raised**
 8 **in Plaintiffs complaint. The statement is untrue based on recorded**
 9 **documents; and at worst it presents a disputed question of Fact.**

10 There are several genuine issues of material fact in dispute between Plaintiff and
 11 Defendants here. Defendants claim that the purchase contract and amendment are between
 12 "*between three other parties.*"³ On the contrary, the Recorded Memorandum of Contract⁴
 13 executed by both Mr. Greene & Mr. Sellars plainly states that the agreement is between:
 14 "*Joseph Sellars & Gregory Greene (...as Seller) and Auxier Financial Group LLC, dba*
 15 *International Business Brokers and Affiliates (...as Buyer).*"⁵ The Memorandum also provides
 16 the parcel numbers for both parcels acquired by Plaintiff Parcel # 00538000016202 (The
 17 Subject Property herein) and Parcel # 00538000016201 (The adjacent Vacant Parcel.) The
 18 adjacent vacant parcel of property was fully transferred at the time of closing by Warranty
 19 Deed⁶ to Plaintiff and reads "The GRANTOR Land Barons, LLC...dba LB

20 ³See Motion For Summary Judgment (Dkt # 22) Pg. 1 Line 8.

21 ⁴A certified copy of the recorded Memorandum of Contract is attached hereto, marked **Exhibit Q**,
 22 and incorporated by reference as if fully set forth here. A copy of this document is also attached as Exhibit D
 to the Declaration of Greg Greene (Dkt # 25).

⁵See Exhibit Q. Pg. 1 ¶ 1

⁶A certified copy of the adjacent parcel Warranty Deed is attached hereto, marked **Exhibit R**, and incorporated by
 referenced as if fully set forth here. A copy of this deed also is attached as Exhibit

1 **Enterprises...convey and warrants to Auxier Financial Group LLC, dba International**
 2 **Business Brokers and Affiliates...**” This Warranty Deed was executed by both Mr. Sellars &
 3 Mr. Greene and notarized by Cherie Goldsmith the escrow closing agent for the transaction.
 4 The transaction was also identified as being between Auxier Financial Group, LLC d/b/a
 5 IBB&A, Mr. Sellars & Mr. Greene on the HUD-1 final settlement statement prepared by 1st
 6 Choice Escrow⁷. The HUD-1 shows the Buyer as “*Auxier Financial Group LLC, dba IBB&A.*”
 7 Further at the time of execution of the original purchase and sale agreement on March 19th,
 8 2009 the for-profit corporation that Defendants’ refer to as “*IBB&A was a for-profit*
 9 *corporation, organized in Washington in April 2009*” (See MSJ Pg. 9, Line 1) was not yet in
 10 existence. Plaintiff added the International Business Brokers & Affiliates as a DBA of Auxier
 11 Financial Group, LLC, with the Washington State Department of Licensing on March 10th,
 12 2009⁸ specifically to facilitate this transaction. Mr. Sellars and Mr. Greene executed several
 13 documents that clearly identified International Business Brokers & Affiliates (IBB&A) as a
 14 dba of Auxier Financial Group, LLC. Furthermore both Mr. Sellars and Mr. Green have dealt
 15 with Josh Auxier and Auxier Financial Group, LLC for almost 3 years, since March 19, 2009,
 16 and never claimed to Mr. Auxier that they did not know that Auxier Financial Group, LLC
 17 was not the real buyer/party in interest in their transactions. See Decl. of Josh Auxier (Dkt#
 18 37-1) p. 12 line 22, through p. 19, line 16. ¶¶ 2.1 – 2.7, including all sub-¶¶ thereof.

19 Therefore, such statements made by Defendants, Mr. Sellars, and Mr. Greene as:

20
 21 ⁷A copy of the Final HUD-1 is attached hereto, marked **Exhibit S**, and incorporated by referenced as if fully set forth here.

22 ⁸A copy of the confirmation from the WA DOL is attached hereto, marked **Exhibit T**, and incorporated by referenced as if fully set forth here.

1 *"At no time during the negotiations did anyone represent that Mr. Greene was actually*
 2 *doing business with Plaintiff Auxier Financial Group, LLC. Id. At all times during these*
transactions, Mr. Sellars believed he was doing business with IBB&A. Sellars Decl. ¶ 11."

3 are simply false, and inconsistent with document each of them has signed. Another
 4 false statement in Defendant's Motion For Summary Judgment is that when Ms. Brown-
 5 Velez introduced Mr. Auxier to Mr. Sellars both Mr. Auxier and Ms. Velez were employed by
 6 IBB&A. That is not only false but impossible because the corporation did not yet exist until
 7 April 8, 2009, whereas Mr. Auxier and Mr. Sellers spoke in early to mid-March, prior to the
 8 signing of the Purchase and sale agreements on March 19, 2009. Mr. Auxier clearly stated
 9 who he was and who Auxier Financial Group LLC dba IBB&A was. The corporation
 10 Defendants claim was the intended buyer was not in existence until April 8th, 2009, about three
 11 weeks after the documents of purchase and Sale were signed on March 19, 2009, and about 2
 12 weeks after the closing of both transactions had occurred on March 27, 2009.

13 The provisions of the interrelated purchase and sale agreements signed March 19, 2009
 14 were as follows: The closing date on both transactions was set for March 27, 2009. Plaintiff
 15 was to pay \$31,000 plus reinstate the Sellars Loan before the scheduled foreclosure sale, which
 16 was set within the next few days after March 19, 2009. Buyer was to receive the statutory
 17 warranty deed on the vacant adjacent parcel when the \$31,000.00 was paid (See wording of
 18 Ex. F, p.2, ¶ c & e attached to the Decl. of Greene.) Plaintiff agreed to wait to receive the
 19 deed on the parcel known as 2525 Center Rd until the title had been cleared. In the interim,
 20 Plaintiff as buyer would take possession of the property, rent and manage it, maintain it, and
 21 keep all rents. The total amount needed for reinstatement to cure the default to stop the
 22 pending foreclosure being processed by Northwest Trustee Services Inc. was not known at the
 time of the execution of the purchase and sale agreements on March 19, 2009, and therefore

1 the amount of purchase price for 2525 Center Rd was left blank. The reinstatement figure from
 2 the trustee was later learned to be \$17,020.71, which was paid.

3 Plaintiff disputes Defendants' statement that reads:

4
 5 *"the parties agreed that once IBB&A paid the Loan in full, Mr. Greene and Mr. Sellars would*
 6 *transfer their interest in the Property to IBB&A for a price to be determined later. Greene*
Decl. ¶ 4 & Ex. C; Sellars Decl. ¶ 6 & Ex. D." (See MSJ Pg. 4 lines 1-3).

7 There were never and are not now any agreements in writing or orally to pay additional
 8 payments to Mr. Greene or Mr. Sellars for the 2525 Center Rd property. The payments on the
 9 existing loan that encumbered the property were originally covered by provisions of the Form
 10 34 Addendum, which is Ex. F, p. 6, attached to Decl. of Greene. The provisions of the
 11 Amendment to Purchase & Sales Agreement dated March 24, 2010, pertaining to 2525 Center
 12 Rd., (Ex. E, Decl. of Greene,) Item 1, reads precisely as follows:

13 "1. Purchase Price – To be Determined by result of final discount and/or workout of
 14 encumbrances & liens on title."

15 The word "Determined" in that sentence means the price is "fixed" and "established" based
 16 on the amount to pay off the discount or workout of the encumbrances and liens. It doesn't
 17 state and it doesn't mean that the parties are to negotiate to a higher or additional amount to be
 18 paid to the sellers based on the final discount or workout of the encumbrances & liens on the
 19 property. Nor was there or is there any agreement to engage in any additional negotiations that
 20 need to be conducted at a later date.

21 There is no additional monetary consideration owed to Mr. Sellars or Mr. Greene under
 22 the terms of the interrelated transactions. Furthermore, the Sellars loan has been discharged

1 against Mr. Sellars, via Mr. Sellars' Bankruptcy, and Mr. Greene was never personally liable
2 for the loan. So there is no risk to either of them from the Note.

3 Concerning the claim of JPMorgan Chase Bank that it holds the original indorsed Note
4 signed by Mr. Sellars, the proof does not stand up as superior to the claims of the Trustees of
5 the respective . . . OC1 Trust and the . . . OA4 Trust, to hold all rights to the note, which
6 claims are based on the express written assignments to each of the securitized Trusts, prepared
7 and signed by authorized persons on behalf of JPMorgan Chase Bank, and then recorded by
8 JPMorgan Chase Bank. The recitals in the respective recorded documents state that the
9 transfers were made in exchange for "For value received." The main proof offered by Chase
10 Bank is the Declaration of Karina Mirzoyan, which does not state or show that she has
11 personal knowledge that Chase Bank possesses the valid and enforceable original note
12 instrument properly indorsed in this case. Ms. Mirzoyan does not attest to where her office is
13 located, or where she was when she claims that she reviewed relevant business records that
14 enabled her to identify the particular note as an indorsed original, nor does she state her
15 training or experience, or length of employment in her position. Her declaration states that she
16 signed it in Chatsworth, CA, which is part of the greater Los Angeles area located just west
17 and a bit north of Northridge, and west of Simi Valley. Yet the document she claims to verify
18 was reputedly kept in a vault in Louisiana. She claims to be a "Senior Research Specialist"
19 who works "on issues that require familiarity with , and access to, original loan file documents
20 in Chase's possession." She does not explain how she does that work, or what issues she
21 works on, and she does not state where the original loan files are kept, or how she acquires or
22 achieves access to the "original loan file documents" or how and why such documents are
even in "Chase's Possession" if the loan file documents were part of a large group of loans

1 placed in a securitized "Remic" investment trust. Ms. Mirzoyan states that she has "personal
 2 knowledge of," or has "confirmed through my review of business records, the facts stated in
 3 this Declaration and they are and (sic) correct." Her declaration does not support her personal
 4 knowledge of the validity, enforceability, or origin of the document that she "*arranged for its*
 5 *delivery to our counsel, at the attention of Fred Burnside, via Federal Express on October 28,*
 6 *2011.*" Ms. Mirzoyan states that "*Chase physically acquired the Note, endorsed in blank,*
 7 *when it acquired the assets of Washington Mutual Bank from the FDIC, acting as receiver, in*
 8 *September 2008.*" Ms. Mirzoyan never states when or how she learned any of that information
 9 recited in her declaration except what she was told by someone else or read on a computer
 10 screen. It is unlikely that she personally knows any information as to when or by whom the
 11 alleged "indorsement" was affixed to the version of the Note attached to her Declaration. . She
 12 does not state any factual foundation for her bare assertions, which are mere conclusions.

13 Furthermore if the Sellars Loan Note was securitized in either of the two investment
 14 trust, (either the ...OC1 Trust or the ...OA4 Trust) then it would be physically impossible for
 15 it to have been part of the assets transferred by the FDIC to JPMorgan Chase Bank. when
 16 examined in light of the past statements and governing documents of the "...OC1 Trust"⁹ and
 17 the governing documents of the "...OA4 Trust"¹⁰ which specifically state:

18 *"On the Closing Date, the Company¹¹ shall deliver to and deposit with, or*
 19 *cause to be delivered to and deposited with, the Trustee or the Initial*

20 ⁹ See Exhibit F Pg. 89 § 2.05 & - Delivery of Mortgage Files; this was a different entity from that identified in the
 21 Sept. 25, 2008 Whole Bank Purchase Agreement between Chase Bank and the FDIC.

22 ¹⁰ See Exhibit G, Pg. 63 § 2.05 - Delivery of Mortgage Files; The Initial Custodian listed in both documents is
 "Washington Mutual Bank, fsb." This was a different entity from that identified in the Sept. 25, 2008 Whole
 Bank Purchase Agreement between Chase Bank and the FDIC.

¹¹The "Company" in both the "...OC1 Trust" PSA See Pg. 40, referring to "*The meaning specified in the*
introductory paragraph hereof" the introductory paragraph being on Pg. 15 defines "Company" as "*WaMu Asset*

1 *Custodian*¹² the Mortgage Files¹³ which shall at all times be identified in the
 2 records of the Trustee or the Initial Custodian, as applicable, as being held by
 or on behalf of the Trust."

3 The "certain assets" allegedly acquired by Defendant Chase via the transaction with
 4 the FDIC cannot be identified because there is not a clear and concise description of these
 5 "certain assets", as the schedule was referenced as defining the "certain assets" acquired by
 6 Defendant Chase Bank in the transaction was later described on the FDIC's website as a
 7 "scrivener's error."¹⁴ Furthermore, the "certain assets" were assets of "Washington Mutual
 8 Bank, Henderson, Nevada" not that of the entity described in the governing documents of
 9 either the "...OC1 Trust" or the "...OA4 Trust" as the Initial Custodian "Washington Mutual
 10 Bank, FSB." Washington Mutual Bank, FSB was a completely separate entity based out of
 11 Park City, UT¹⁵ and while both were bank holding companies of Washington Mutual, Inc. the
 12 only entity referred to in the Purchase and Assumption Agreement (See **Exhibit P**)¹⁶ relied

13
 14 Acceptance Corp., as depositor"; in the "OA4 Trust" PSA See Pg. 29 & Pg 11 for identical verbiage and
 definitions.

15 ¹²The "Initial Custodian" is defined as "Washington Mutual Bank, fsb" in both the "...OC1 Trust" PSA See Pg.
 46; and the "OA4 Trust" PSA See Pg. 36.

16 ¹³ The Definition of "Mortgage File" in both the "...OC1 Trust" (See Pg. 48) and "...OA4 Trust" (See Pg. 38)
 PSAs includes "The original Mortgage Note..."

17 ¹⁴See <http://www.fdic.gov/bank/individual/failed/wamu.html> "ATTENTION: The reference to "Schedule 3.1a" in
 18 Article III, Paragraph 3.1, (page 9) of the WAMU P&A Agreement is a scrivener's error—there is no Schedule
 3.1a"

19 ¹⁵See FDIC Cert# 32633 defining Washington Mutual Bank, Henderson, NV Date Established: 12/27/1988
 20 http://www2.fdic.gov/idasp/confirmation_outside.asp?inCert1=32633

21 See FDIC Cert # 33891 defining Washington Mutual Bank, fsb, Park City, UT. Date Established 4/15/1994
 22 http://www2.fdic.gov/idasp/confirmation_outside.asp?inCert1=33891

¹⁶ In response to Plaintiff's discovery request for production Defendants produced a copy of this agreement as
 Document # AUXIER001647 a copy of which is attached hereto marked **Exhibit P** and incorporated by reference
 as if fully set forth here.

1 upon by Defendant Chase Bank, as "*Failed Bank*" is "*Washington Mutual Bank, Henderson,*
 2 *Nevada.*"

3 Even if Defendant Chase Bank were able to produce documentation which adequately
 4 supported its claim that the document marked as **Exhibit A** attached to the Dec. of Mirzoyan
 5 was the true original Note, was indorsed at the appropriate time, is the only document in
 6 existence that has been relied upon for enforcement of the debt, and that that this version of the
 7 Note was transferred to the appropriate entity at the appropriate time, so as to be acquired by
 8 Chase via FDIC Failed Bank purchase, due to Defendant Chase's subsequent actions described
 9 below the Note is no longer adequate to provide Defendant Chase the authority to invoke the
 10 power of sale originally granted by Mr. Sellars to Chicago Title Insurance Company via the
 11 Deed of Trust as Defendant Chase Bank has willingly and voluntarily split off and sold or as
 12 stated in the notarized and recorded documents "*grants, conveys, assigns and transfers*" "*For*
 13 *Value Received*", "*...all beneficial interest under that certain deed of trust...*". In fact, this
 14 occurred not once but twice; first on November 3rd, 2008 to "*...Lasalle Bank NA, as*
 15 *Trustee...OC1 Trust*"¹⁷. Defendant Chase has confirmed that it does not dispute the authority
 16 of "*Amy Weis*", the name signed to the AoDT dated November 3rd, 2008 when it stated
 17 "*Chase does not dispute that Amy Weis had the authority to act as Attorney-in-Fact for Chase*
 18 *when she signed the OC1 Assignment*" in its response to Plaintiff's discovery. Therefore an
 19 authorized party acting on Chase's behalf knowingly offered the Assignment to be filed and
 20 recorded in the Snohomish County Auditor's Office.

21 Defendant Chase then split off and sold the deed of trust for a second time on May 6th,
 22 2010 "*For value received*" to "*...BoFA as. . . Trustee for ...OA4 Trust.*" Defendant Chase has

¹⁷See Exhibit H, the AoDT from Chase to "*...OC1 Trust.*"

confirmed that it does not dispute the authority of "Margaret Dalton", the name signed to the AoDT dated March 6th, 2010 when it stated "*Chase does not dispute that Margaret Dalton was a Vice President of JP Morgan Chase Bank with the authority to execute the OA4 Assignment*" in its response to Plaintiff's discovery. Therefore an authorized party acting on Chase's behalf knowingly offered the Assignment to be filed and recorded in the Snohomish County Auditor's Office.

Those acts by Defendant Chase Bank of splitting off and selling the deed of trust without properly transferring the Note caused a permanent and irreversible fatal flaw upon which two things occurred: 1) The DoT was reduced to a nullity¹⁸ and nothing more than a cloud on the real property and 2) The Sellars' Note became an unsecured obligation. "*If the mortgage is split and sold separately from the loan; the result is an unsecured loan and a worthless mortgage.*"¹⁹ The Note as an unsecured loan became uncollectable against Mr.

¹⁸See Carpenter v. Longan, 83 U.S. 271, 274, 21 L. Ed. 313 (1872) (stating that "[t]he note and mortgage are inseparable; the former as essential, the latter as an incident"; adding that "[a]n assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity"); In re Leisure Time Sports, Inc. 194 B.R. 859, 861 (9th Cir. 1996) (stating that "[a] security interest cannot exist, much less be transferred, independent from the obligation which it secures" and that, "[i]f the debt is not transferred, neither is the security interest"); Kelley v. Upshaw, 39 Cal. 2d 179, 192, 246 P.2d 23 (1952) (stating that assigning only the deed without a transfer of the promissory note is completely ineffective); see also Restatement (3d) of Property (Mortgages) § 5.4 (stating that "[a] mortgage may be enforced only by, or in behalf of, a person who is entitled to enforce the obligation that the mortgage secures") (emphasis added).

¹⁹See Veal v. Am. Home Mortg. Serv., Inc., 450 B.R. 897, 912 (9th Cir. B.A.P. 2011). "*When a note is split from a deed of trust 'the note becomes, as a practical matter, unsecured.'*" Restatement(Third) of Property (Mortgage) § 5.4 cmt. a (1997). Additionally, if the deed of trust was assigned without the note, then the assignee, "*having no interest in the underlying debt or obligation, has a worthless piece of paper.*" Richard R. Powell, Powell on Real Property, § 37.27[2] (2000). Cf. In re Foreclosure Cases, 521 F. Supp. 2d 650, 653 (S.D. Ohio 2007) (finding that one who did not acquire the note which the mortgage secured is not entitled to enforce the lien of the mortgage); In re Mims, 438 B.R. 52, 56 (Bankr. S.D.N.Y. 2010) ("*Under New York law 'foreclosure of a mortgage may not be brought by one who has no title to it and absent transfer of the debt, the assignment of the mortgage is a nullity.'*") (quoting Kluge v. Fugazy, 536 N.Y.S.2d 92, 93 (N.Y. App. Div. 1988)).

1 Sellars when "...Mr. Sellers, Chase's debtor..."²⁰ via his Ch. 7 Bankruptcy²¹ was discharged
 2 on August 11th, 2010.

3 This leaves Defendant BofA in both of its alleged capacities as the Trustee of the
 4 "...OC1 Trust" and the "...OA4 Trust" in a less than favorable position as it seemingly was
 5 duped by Defendant Chase into acquiring nothing more than a "*worthless piece of paper*",
 6 (See *Powell on Real Property, f.n.19*) that continues to be a cloud on title of 2525 Center Rd,
 7 Everett, WA 98204, and an unenforceable security instrument, if it acquired anything at all.
 8 The only thing that appears certain is that neither Defendant BofA in either of its capacities nor
 9 Defendant Chase have produced evidence that supports their claims that they independently or
 10 in some Principal/Agent relationship have the exclusive rights or authority to foreclose on the
 11 subject real property which would deprive Plaintiff of its rights in the subject property which
 12 were validly obtained directly from Mr. Sellars and Mr. Green, because they do not possess or
 13 control the note.

14 **3.3. Plaintiff Has Standing. – Both Constitutional and Prudential.**

15 Plaintiff vigorously disputes Defendants' lack of standing argument. First, Plaintiff is
 16 the real party holding the vendee's interest in 2525 Center Rd, Everett, WA 98204.' There is
 17 evidence in this record that Plaintiff is the real owner of the vendee's interest in 2525 Center
 18 Rd, Everett WA 98204. The Plaintiff's property rights are based on written documents, all of
 19 which were signed by Mr. Sellars and Mr. Greene. Some of the documents are recorded, and
 20 some are not and need not be recorded to be interpreted and enforced according to their terms.
 21 The recorded documents include (a) a Statutory Warranty Deed conveying title to an adjacent

22 ²⁰ See MSJ Pg. 15 Line 21

²¹ In re: Joseph Thomas Sellars And Kristi Kay Sellars Case No. 10-14955-KAO,

vacant piece of land next to 2525 Center Rd, Everett, WA 98204; and (b) a recorded Memorandum of Contract for sale of 2525 Center Rd, Everett, WA 98204. An unrecorded but relevant document is (c) the HUD-1 Final Settlement Statement dated March 21, 2009, that shows the accounting for the two interrelated transactions, and shows that the buyer is Auxier Financial Group LLC dba IBB&A. The Two interrelated Purchase and Sale Agreements were signed the same day, March 19, 2009. Only Auxier Financial Group LLC dba IBB&A existed at that time.. One Purchase and Sale Agreement was for a residence and lot (25425 Center Rd) with an addendum form 34, and an Amendment dated about a year later on March 24, 2010. The other purchase and sale agreement was for an adjacent parcel of vacant land, owned by Mr. Sellars and Mr. Greene through an entity they co-owned. The two transactions were tied together by the purchase and sale agreements; and both closed on the same date, March 27, 2009. See Declaration of Josh Auxier (Dkt#37-1), p.13, line 16, through p. 19, line 12, incl., and Exhibits B-1 through B-4 incl.

In addition, Auxier Financial dba IBB&A paid (1) \$31,000.00 for the unencumbered adjacent vacant land, and received the statutory warranty deed referred to above at the time the disbursement was made to Mr. Sellars and Mr. Greene, when both purchase and sale agreements were closed as provided on March 27, 2009. In addition Auxier Financial dba IBB&A, paid (2) \$17, 020.71, to cure the prior default of the sellers' loan to avoid a prior foreclosure based on the sellers' loan, after which the sellers placed the buyer in possession and the buyer assumed complete management control of the 2525 Center Rd property including the authority to rent the property, and collect and keep the rent. In addition, under the terms of the Purchase and Sale Agreement related to the 2525 Center Rd parcel, Auxier

1 Financial dba IBB&A agreed (3) to pay the monthly payments on the Sellers's loan pursuant
2 to provision in the Addendum Form 34. See Id

3 The prior foreclosure of the sellers' loan had been brought by a different foreclosing
4 trustee on behalf of a different reputed beneficiary of the deed of trust that encumbered 2525
5 Center Rd who had clearly appeared on a preliminary title report as the only secured creditor
6 entity having an interest in the sellers' loan which encumbered the parcel at the time Plaintiff
7 acquired an interest in the real property parcel in the spring of 2009. See Declaration of Josh
8 Auxier, (Dkt 37) p. 21, line 10 through p. 23 Plaintiff authorized the reinstatement payment of
9 17,020.71, and thereafter made monthly payments on the loan initially to Washington Mutual
10 Home Loans, who had supplied Plaintiff with a copy of the note (**Exhibit A-1 attached to**
11 **Decl. of Josh Auxier** and later to JPMorgan Chase Bank who claimed to be the successor to
12 Washington Mutual Bank by way of transfer from the FDIC. Plaintiff paid a total amount of
13 \$ 14,850.84 in monthly payments before the Amendment to Purchase and Sale Agreement was
14 signed on March 24, 2010. Plaintiff has paid a total of \$31,871.55 toward the "Sellers" loan
15 that encumbers 2525 Center Rd, Everett, WA 98204, since Plaintiff acquired its vendee's
16 interest in that property, as demonstrated above.

17 On March 24, 2010, the Amendment of Purchase and Sale Agreement dated March 11,
18 2012, specifically changed the obligations of Auxier Financial Group, LLC dba IBB&A., and
19 removed (terminated) the obligation of Plaintiff Auxier Financial dba IBB&A to keep the
20 monthly payment on the Seller's loan current.

21 Plaintiff asserts that it has been greatly harmed and hindered in its redevelopment plans
22 for the combined parcels of property by the actions of Defendants that has left in its wake a
very clouded and confused collection of encumbrances on the title of 2525 Center Rd, Everett,

1 WA 98204, showing conflicting recorded assignment documents to two different investment
 2 trusts that result in conflicting provisions of different sections of different chapters of the
 3 UCC, and the probable fact based on the evidence in the assignment of deed of trust
 4 documents recorded by JPMorgan Chase Bank that the Note reputedly secured by the deed of
 5 trust may no longer be a secured negotiable note at all. Plaintiff cannot proceed with its
 6 intended redevelopment of the property while those encumbrances remain on the title.

7 Therefore, Plaintiff's rights as vendee of 2525 Center Rd have been damaged, and the
 8 cause of the damage is directly tied to the behavior of JPMorgan Chase Bank in the making of
 9 the assignments that cloud the title to 2525 Center Rd. and Bank of America NA, as successor
 10 to LaSalle Bank, has relied on each of the two assignments at different times to attempt to
 11 foreclose on the property at 2525 Center Rd, Everett, WA 98204 for the benefit of two
 12 different investment trusts; and the last attempted non-judicial foreclosure was a clear
 13 undeniable violation of the Washington Deed of Trust Act, Chapter RCW 61.24.

14 The clouded and confused title issue will not go away even if the Note is negotiable,
 15 properly endorsed in blank, and held by JPMorgan Chase Bank. The reason is that JPMorgan
 16 Chase Bank knowingly made two successive assignments of the deed of trust for value
 17 received, claiming in those assignment documents that it also was transferring the note to the
 18 assignee in the respective assignments, but according to its own admission in the Declaration
 19 of Karina Mirzoyan, Chase Bank retained possession of the note and did not transfer it when
 20 the two successive assignments were made. Thus the note was intentionally separated from
 21 the deed of trust by the actions of JPMorgan Chase Bank and became unsecured.

22 Defendants' own evidence shows that JPMorgan Chase Bank knowingly assigned
 away the deed of trust and note to each trustee – First to LaSalle Bank, NA in November

2008, as Trustee for the ...OC1 Trust, for value received; and later to Bank of America as successor of LaSalle Bank by merger as Trustee for the ... OA4 Trust, for value received , while withholding the note in both transactions– all of which would be and is contrary to the relevant provisions of the Pooling And Servicing Agreements of the respective trusts, and thereby effectively separated the deed of trust from the note. JP Morgan Chase Bank not only did that once – it did it twice by its own admission and its own documents, which it caused to be recorded. That fact pattern supports Plaintiff's argument that by its own behavior JPMorgan Chase Bank turned the Sellars Note from a secured note into an unsecured note; and thus supports Plaintiff's position that no one can foreclose the deed of trust.

IV. Summary and Conclusion.

Plaintiff has submitted substantial evidence, much of it from or supported by Defendants' own records and evidence that shows that Plaintiff is the owner of the vendee's interest in 2525 Center Rd, Everett WA 98204; and the outright owner of the interrelated vacant parcel conveyed by deed to Plaintiff by Mr. Sellars and Mr. Greene. Based on that evidence Plaintiff is a real party in interest. Therefore, Defendant's motion for summary judgment to the contrary should be denied. Plaintiff has produced evidence which demonstrates and supports its constitutional and prudential standing. Plaintiff has been harmed by Defendants' actions, which have directly caused the clouds on title that have hindered Plaintiff from proceeding with its plans for redevelopment of the property.

QLS has terminated the illegally commenced non-judicial foreclosure and there is no other pending foreclosure scheduled by anyone. Under the current circumstances Plaintiff's originally requested relief against Quality Loan Service and Bank of America for a temporary restraining order, and preliminary and permanent injunctive relief are not currently

1 applicable because there is no immediately pending threat of foreclosure. However, the
 2 threat of foreclosure at a later time still remains. The Defendants may begin another unlawful
 3 foreclosure proceeding prior to the resolution of the inherently conflicting rights of the
 4 Defendants' in the Note, and Deed of Trust, based on the currently recorded assignment
 5 documents. Therefore, the Plaintiff's claims for injunctive relief should be dismissed without
 6 prejudice so as to preserve Plaintiff's right to defend against any subsequent attempts of any
 7 of the Defendants to perform an unlawful non-judicial foreclosure.

8 Plaintiff's request for Declaratory Judgment requiring any party who claims the right
 9 to enforce the original note and deed of trust must provide strict proof of its standing to do so
 10 by proving it is the "person entitled to enforce" the original note and proving it has the
 11 authority to instruct the trustee to foreclose on the deed of trust should not be dismissed
 12 because it requires claimant to follow applicable law. Plaintiff's claims for violation of the
 13 Washington State Consumer Protection Act are supported by the evidence of assignment
 14 documents created on behalf of the Defendant Banks that contain false statements for the
 15 purpose of supporting unlawful non-judicial foreclosures, when the assignees never became
 16 the holder of the original note, and thus never had the right as beneficiary to foreclose the
 17 deed of trust. The assignments were false, and violated the public policy of good faith and
 18 honesty in financial and business transactions. The Consumer Protection Claims of Plaintiff
 19 should not be dismissed..

20 Dated January 24, 2012..

Respectfully submitted,

/s/ Edward L. Mueller

Edward L. Mueller, WSBA # 264
 of Mueller & Associates, Inc. P.S.
 Attorney For Plaintiff

CERTIFICATE OF SERVICE.

I hereby certify that on January 26, 2012, I caused a copy of the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system which will send e-mail notification of such filing to the following participants:

Legal counsel for Defendants JP Morgan Chase Bank N.A.
and Bank of America, N.A.:

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Dated. January 26, 2012.

/s/ Edward L. Mueller
Edward L. Mueller, WSBA # 264